Supreme Court of the United States

OCTOBER TERM—1963

No. 167

SIDNEY J. UNGAR, *Appellant,*

against

HONORABLE JOSEPH A. SARAFITE, Judge of the Court of General Sessions of the County of New York, *Appellee.*

REPLY BRIEF FOR APPELLANT

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February 4, 1964.

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The appellant submits the following short brief in reply to the points urged by the appellee.

(1)

The appellee argues that since the power to punish for contempt could have been exercised instantly at the trial, the postponement of the contempt proceedings until after the termination of the trial did not and should not alter the procedure. This is essentially the heart of the appellee's argument.

Assuming the power of the trial court to instantly punish a contempt committed in his presence, it is only necessity of circumstances, at best, which has produced the anomaly of allowing the same judge to be the complainant, prosecutor, law-maker and judge in his own case. But once the necessity is gone by the termination of the trial, as in this case, there is no reason why the

contempt hearing must take place before the same judge, especially when the judge is personally involved in the charges with the alleged contemnor.

The appellee complains that the appellant would diminish the power to punish merely because its exercise was delayed for the reasonable needs of the administration of justice at the criminal trial. But the appellee urges a power, which has no foundation in history or in the necessities of jurisprudence. Power does not exist in a vacuum. If the power to punish for contempt is summarily exercised by the same judge at a trial because of necessity, it does not then follow that such power is authorized when the necessity does not exist. It is not a question of diminishing the power in the latter circumstances. It is a recognition (though *arguendo*) that there is authority for the power in one instance, and its lack in the other.

There need be no misgivings about the distinction. The administration of justice will not suffer by the withholding of such power in a case like the instant one. All that will happen is that the hearing will take place before a judge other than the one who makes the charges. That requirement will not place any unusual demand on the machinery of the courts. And as appellant pointed out in Brief for the Appellant, even the New York Court of Appeals admonished against the practice, but did not provide the appellant a remedy to conform to its words.

Had the appellee filed a complaint against appellant in a criminal prosecution, charging the appellant with the acts he complained of as contemptuous, the case would have been tried before another tribunal, with all the protections of due process, and without any extraordinary burdens on either the complainant or the tribunal.

(2)

The appellee also argues that the words spoken by the appellant were found by the state courts to be contemptuous and therefore, there is nothing for this court to review. Assuming such a finding cannot be reviewed, there still remains for this court to pass upon the validity of the statutes on their face and as construed, whereby a judge is empowered to make his own law and sit in the same case in which he is the complainant and is embroiled with the accused.

But the appellee is incorrect in its assumption that this court may not review the finding of contempt. This court may review a finding when the constitutional right rests upon it. *Feiner* v. *New York*, 340 U. S. 315. *Thompson* v. *Louisville*, 363 U. S. 199. Here, there was a serious question whether the appellant wilfully uttered the words or whether they were produced through provocation and circumstances beyond appellant's control. There was no concession by the appellant in the Court of Appeals that his acts were contemptuous. Appellant there argued that it would be contempt if the words had been said "deliberately and wilfully" and "with an intent to defy the dignity and authority of the Court"; appellant then argued that no such facts or motives existed or were proved and therefore there was no contempt.

(3)

The validity of Section 750 was challenged by appellant in the contempt proceedings, although not stated explicitly. Appellant was not represented by counsel—as he had a right to be—nevertheless in a hostile environment he did his best to point out the uncertainty of the charges he had to meet. This court in *Tomkins* v. *Missouri*, 323 U. S.

485, 487 and *Pollard* v. *United States*, 352 U. S. 354, 359 recognized the sufficiency of the challenges, albeit implicit, under similar circumstances.

In any event Section 750 is so interwoven with Section 751 (see Mr. Justice Black in *Green* v. *United*, at page 198, "allows * * * a judge to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in 'judgment' on his own charges, and then within the broadest kind of bounds to punish as he sees fit"), that the two sections are really one inseparable law distinguished only by numbering.

(4)

This brief would have been concluded were it not for the erroneous statements of fact in appellee's brief. While those errors do not directly affect the issues of law before this court, nevertheless appellant, for the sake of a complete and accurate record must make the following observations:

1. Appellee in his brief (page 2) asserts that Hulan Jack was indicted and convicted for accepting gifts from Sidney J. Ungar whereby his official actions might be influenced. This charge was contained in Count Four of the indictment. But Jack was acquitted of said charge. He was convicted on a charge under Section 886 of the New York City Charter, which states that any municipal employee who accepts a loan or gift or thing of value directly or *indirectly*, from anyone interested directly or *indirectly* in the performance of a contract involving the payment of money from the City Treasury is guilty of a misdemeanor. It was never proved that Jack's official actions were involved or influenced. In fact, on appeal by Jack the statute was attacked as vague.

2. Appellee (page 2) refers to immunity granted to appellant, but omits to state that appellant withdrew such immunity before the Grand Jury but the offer was rejected by the District Attorney.

3. Appellee uncomplimentarily characterizes the appellant's behavior. But a reading of the Order to Show Cause (R. 70-91) and the record of the trial will show that appellant was not uncooperative, evasive, disrespectful or cavilling. There were scarcely any interruptions or warnings in open court during the several days appellant testified.

4. Appellee states (page 2) that Hulan Jack was a long-time friend of appellant. That was true. But it should not be overlooked that the Assistant District Attorney who was badgering and provoking appellant during his testimony was a long-time associate in the District Attorney's office and friend of the appellee.

5. The record of the events leading to the alleged contemptuous utterance is found on pages 54-56 of the record. They show that the questions the District Attorney asked were not unpleasant to appellant (as appellee states, page 4), but only unanswerable in the form asked, and that under the circumstances, the appellant's claim that he was being "pressured, coerced and intimidated into testifying" was accurate.

6. Appellee asserts (page 18) that appellee could have disposed of the contempt charges in an impartial manner, because he was not personally embroiled with appellant. Yet appellee asserts (page 9) that the accusation made by appellant was so serious that it was slanderous of the appellee. Slander, by definition is the giving of personal

offense. It therefore implies embroilment. It is hard to conceive of an impartial hearing by one so slandered.

7. Likewise, in the attempt to demonstrate that appellee could be impartial, inconsistencies appear throughout his argument. For example, on page 18 appellee states he could be impartial, because there were "no heated wrangling or intemperate personal exchanges, but a single shouted defiance." Yet his brief is replete with references (pp. 9, 14, 15, 16) to the disorderly character of appellant's behavior. If appellant was so free of disorderly behavior, why did the appellee go to great pains in enumerating lengthy specifications of them and why does appellee again dwell upon them? If appellant was without sin except for the single instance of shouted defiance, then the sole charge of contempt is that instance. And that charge is the personal embroilment with appellant that made them adversaries. It is an unseemly spectacle in jurisprudence for an adversary to sit in judgment on his accuser, no matter how earnest or sincere his professions of impartiality may be. Under our system of jurisprudence not only must there be a hope for impartiality, but there must be an appearance of it. An adversary cannot *prima-facie* appear impartial.

8. Appellee asserts (p. 24) without any factual basis that appellant deliberately retained counsel who had an actual court engagement. The facts are clearly to the contrary. Appellant was served with papers of a complex nature that occupy 24 pages of the Transcript of Record (R. 67) in the late afternoon of a Thursday returnable on the following Tuesday. During that period he sought to retain available counsel, but without success. During the week-end a 17-inch snowstorm paralyzed work and traffic in New York.

Had appellant been charged with illegal parking of a motor vehicle he would have been accorded greater protections, even under normal conditions. Yet appellant laboring under the handicap of complexity, the unusual snowstorm and the interval of only one business day was expected to be ready for trial with counsel in a contempt proceeding in which his liberty and his reputation as a lawyer and person were at stake. This is unbelievable! It reveals the prejudice of the appellee against appellant, or at best, demonstrates a disregard of the constitutional right of the appellant to a fair hearing before an impartial tribunal.

Respectfully submitted,

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February 4, 1964.